Supreme Court, U.S.
FILED
JUN 22 1998
CLERK

No. 97-1881

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ANDREW LLOYD WEBBER; REALLY USEFUL GROUP, PLC; REALLY USEFUL COMPANY, INCORPORATED; MCA RECORDS, INC.; HAL LEONARD PUBLISHING CORPORATION; POLYGRAM RECORDS, INCORPORATED,

Petitioners,

v.

RAY REPP AND K & R MUSIC, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether the court of appeals appropriately determined that, in light of a genuine issue of material fact, summary judgment was inappropriate.

STATEMENT PURSUANT TO RULE 29.6

Respondents are Ray Repp, an individual, and K&R Music, Inc., a corporation. K&R Music, Inc. has no parent or subsidiary corporation.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 132 F.3d 882 (2d Cir. 1997). The opinion of the district court is reported at 858 F. Supp. 1292 (S.D.N.Y. 1994). Other opinions in the case are reported at: 947 F. Supp. 105 (S.D.N.Y. 1996); 914 F. Supp. 80 (S.D.N.Y. 1996); 892 F. Supp. 552 (S.D.N.Y. 1995); and 142 F.R.D. 398 (S.D.N.Y. 1992).

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1997. A petition for rehearing and suggestion for rehearing en banc was denied on February 20, 1998. Pet. App. 48a. The petition for writ of certiorari was filed on May 20, 1998 and placed on the docket on May 21, 1998.

STATEMENT OF THE CASE

In this copyright action, respondents, songwriter Ray Repp and his publishing company, K & R Music, Inc., maintain that the "Phantom Song" in "The Phantom of the Opera" infringes respondent Repp's composition "Till You." Petitioners are the composer of the allegedly infringing song (Andrew Lloyd Webber), the publisher and copyright owner of the allegedly infringing song (Really Useful Group, Limited), and various licensees of rights in the allegedly infringing song.

The district court granted summary judgment to petitioners, but the court of appeals held that the evidence raised material factual issues and that the case should proceed to trial. A jury trial in the case is set to begin on November 2, 1998. App., *infra*, 1a.

A. The District Court

In the district court, petitioners moved for summary judgment, claiming that petitioner Lloyd Webber lacked access to, and had not copied, respondent Repp's "Till You" in composing the "Phantom Song." The district court granted petitioners' motion. Pet. App. 23a-47a.

The district court recognized the settled principle that, in certain cases, the similarities between the plaintiff's and defendant's work may be so extensive and striking as, without more, both to justify an inference of copying and to prove improper appropriation. Pet. App. 43a. The court

found, however, that respondents' proof in this case was inadequate to establish such "striking similarity." *Id.* at 44a.

In doing so, the district court recognized the propriety and admissibility of the expert musicological testimony submitted by respondents' distinguished experts. Pet. App. 44a.[1] But the district court refused to credit that testimony, instead substituting its own view. *Id.*

Professor Hitchcock concluded unequivocally that there is "no doubt about the striking similarity" of the two songs. Pet. App. 19a. He summarized: "the similarities are so many, in so many areas, over such an extraordinary proportion of the compositions, that I cannot consider them as insignificant or coincidental, and I must conclude that 'Phantom Song' is based on 'Till You.'" *Id.* at 9a-10a. Professor Mack also squarely concluded that "'Till You' and 'Phantom' are strikingly similar, and are so similar as to preclude separate creation." *Id.* at 10a.

Notwithstanding this evidence, the district court discerned no genuine issue of material fact regarding striking similarity. The district court stated that, based on its own "aural examination of the two songs and consideration of the expert testimony submitted by both parties, the Court finds that any similarities that exist between the two works are not so extensive as to support an inference of copying and improper appropriation without more." Pet. App. 44a. The district court gave no weight to respondents' separate evidence regarding petitioner Lloyd Webber's access to "Till

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[1] Respondents' experts are Professors H. Wiley Hitchcock and James Mack. Professor Hitchcock is Distinguished Professor of Music at the City University of New York and Founding Director of the Institute of Studies in American Music at Brooklyn College of City University; he is the author of a number of scholarly books and articles about music. Pet. App. 9a. Professor Mack is Professor and Chairman of the Humanities Department at Harold Washington College in Chicago, Illinois; he has composed music and has been employed as an arranger, conductor, and record producer. *Id.* at 10a.

You," including evidence of the song's wide public distribution. *Id.* at 38a-43a. Instead, it chose to credit the affidavits from petitioner Lloyd Webber and his former wife claiming his independent creation of the allegedly infringing song, and accorded no weight to respondents' evidence regarding petitioner Lloyd Webber's prior copying of songs. *Id.* at 44a-45a.[2]

B. The Court of Appeals

The court of appeals unanimously reversed the district court's grant of summary judgment to petitioners, and remanded for further proceedings. Pet. App. 1a-22a. On remand, the district court has set the case for jury trial starting on November 2, 1998. App., *infra*, 1a.

The court of appeals applied settled summary judgment principles. It "review[ed] the granting of a motion for summary judgment by applying the same standard as the district court applied and determin[ed] *de novo* whether or not summary judgment [was] warranted." Pet. App. 16a. The court of appeals emphasized that "it is necessary . . . to resolve all ambiguities and draw all inferences in favor of the non-moving party." *Id.* at 16a-17a. The court concluded that the district court had misapplied these principles:

> Clearly, the duty of a court on a motion for summary judgment is to determine whether there are any genuine issues of material fact to be resolved by trial and not to decide factual issues. In this regard, the court's task

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[2] Petitioners Lloyd Webber and Really Useful Group, Limited also filed a counterclaim, asserting that respondent Repp's "Till You" itself had been copied from petitioner Lloyd Webber's "Close Every Door." After a five-day trial on the counterclaim, the district court held in favor of respondent Repp. *Repp v. Webber*, 947 F. Supp. 105 (S.D.N.Y. 1996), *aff'd*, 132 F.3d 882 (2d Cir. 1997). The court credited respondent Repp's trial testimony, finding it supported by "the weight of credible evidence." 947 F. Supp. at 114-15; *see also* Pet. App. 14a, 22a.

> is issue identification, not issue resolution. . . . In performing this task, we must assume the truth of the non-movant's evidence. . . It seems to us that the district court failed to make the requisite assumption. We think that the district court undertook to resolve some material issues of fact revealed on the motion for summary judgment rather than to identify those issues and leave them for trial.

Id. at 17a-18a.

The court of appeals explained that the district court "recognized our rule permitting an inference of access where there is 'striking similarity.'" Pet. App. 19a. The court concluded, however, that "the district court fell into error in rejecting the evidence presented by the plaintiffs and making findings on this issue." *Id.* Pointing to respondents' evidence establishing striking similarity, the court of appeals held that "there was considerable evidence that 'Phantom Song' is so strikingly similar to 'Till You' as to preclude the possibility of independent creation and to allow access to be inferred without direct proof." *Id.*

Recognizing that the district court had relied on its own aural examination to reach a contrary conclusion, the court emphasized that "[i]t was not for the district court to make this factual finding where such strong competing evidence was before it." Pet. App. 19a. The court reiterated that "[a]ccess to the music of Repp [is] an essential element of his case," but determined that "it cannot be said that there is an absence of evidence to support proof of that element through the inference generated by the striking similarity of the two pieces." *Id.* at 19a-20a. As for the affidavits of petitioner Webber and his former wife, the court emphasized that it was for the fact-finder to consider that evidence in

light of other evidence, including respondents' evidence of striking similarity. *Id.* at 20a-21a.[3]

Petitioners requested rehearing and rehearing en banc concerning the court of appeals' reversal of summary judgment and remand for further proceedings. The court of appeals denied the petition, without dissent and with no judge requesting a vote on the suggestion for rehearing en banc. Pet. App. 48a-49a.

ARGUMENT

The petition raises no issue warranting this Court's review. The court of appeals held that the district court had misapplied settled summary judgment principles and had erroneously resolved factual issues at the summary judgment stage. The court thus remanded for further proceedings, and the case is set for trial on November 2, 1998. App., *infra*, 1a. The interlocutory character of the court of appeals' decision is itself a sufficient reason for denying the petition. *See e.g., Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

Even aside from the interlocutory character, petitioners' claims do not warrant review. Petitioners repeatedly emphasize their view that the court of appeals' decision conflicts with prior Second Circuit precedent. Even if that characterization were accurate (which it is not), such an asserted intra-Circuit conflict would not warrant this Court's review. *See, e.g., Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (intra-Circuit issue should be resolved by the court of appeals; "[i]t is primarily the task of a Court of

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[3] The court of appeals separately affirmed the district court's trial judgment that respondent Repp had independently composed "Till You," and had not copied petitioner Lloyd Webber's 'Close Every Door.'" Pet. App. 21a-22a.

Appeals to reconcile its internal difficulties"). Petitioners' claim of an intra-Circuit conflict, in any event, is erroneous, as reflected by the court of appeals' unanimous decision and the lack of a single judge requesting a vote on the suggestion for rehearing en banc.

Petitioners likewise erroneously claim that the court of appeals' decision conflicts with decisions of other courts of appeals (some of which are unpublished). The court of appeals, of course, perceived no conflict with any other court. It noted that, depending on the context, evidence of striking similarity may give rise to an inference of access and copying. Pet. App. 16a. The court then merely determined that the district court had recognized this settled principle, had erroneously evaluated the particular evidence in this case, and had misapplied summary judgment principles. *Id.* at 19a.

Petitioners' asserted grounds for review are specious. *First*, petitioners claim that review is warranted because "The Court Below Has Eliminated Plaintiff's Burden Of Establishing Striking Similarity That Precludes The Possibility Of Independent Creation." Pet. 10. However, the court of appeals explicitly recognized and reiterated that an element of striking similarity is evidence of a character that precludes the possibility of independent creation: "'*If the works are so strikingly similar as to preclude the possibility of independent creation*, copying may be proved without a showing of access.'" Pet. App. 16a (quoting *Lipton v. Nature Co.*, 71 F.3d 464, 471 (2d Cir. 1995)); emphasis added). Accordingly, petitioners' claim of a conflict — both within the Second Circuit and with other courts of appeals (Pet. 11) — is incorrect. Petitioners' real quarrel is with the court of appeals' evaluation of the

evidence at issue; but that evidentiary evaluation, which was correct, plainly does not warrant this Court's review.[4]

Petitioners likewise erroneously seek to rely on the court of appeals' reference to the affirmative defense of independent creation. Pet. 11. The court of appeals held that petitioners' proof of independent creation may be considered with all the evidence by the fact-finder. Pet. App. 21a. Thus, any claim by petitioners regarding the weight of the evidence can be decided in light of the fact-finding at trial, and does not present an issue meriting this Court's consideration.[5]

Second, petitioners claim that the court of appeals "eliminated" the plaintiff's burden regarding access when striking similarity is at issue, and that this purported holding conflicts with decisions of the Second Circuit and other

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[4] Almost all of the decisions petitioners cite from other courts of appeals include a holding that, unlike in this case, the evidence itself did not even rise to the level of presenting a colorable issue regarding "striking similarity." *Towler v. Sayles*, 76 F.3d 579, 584 (4th Cir. 1996); *Keeler Brass Co. v. Continental Brass Co.*, 862 F.2d 1063, 1067 (4th Cir. 1988); *Ferguson v. National Broad. Co., Inc.*, 584 F.2d 111, 113 (5th Cir. 1978); *Trapani v. CBS Records, Inc.*, 857 F.2d 1475 (table), 1988 WL 92438, at *3 (6th Cir. 1988); *Selle v. Gibb*, 741 F.2d 896, 905 (7th Cir. 1984); *Benson v. Coca-Cola Co.*, 795 F.2d 973, 975 n.2 (11th Cir. 1986). This leaves only *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167 (7th Cir. 1997), in which the court of appeals, like the court here, found evidence of striking similarity, squarely agreed with the Second Circuit's precedents on striking similarity, and determined that there is no split in the Circuits. *Id.* at 1170-72.

[5] Petitioners' attempt to invoke a treatise suggesting a conflict (Pet. i) likewise is inapposite. All of the circuit cases cited in the treatise concern evaluation of the evidence after trial, *see* 1 William F. Patry, *Copyright Law and Practice* 704 nn. 819-21 (1994), not, as here, a summary judgment decision precluding consideration of the evidence by the fact-finder. Moreover, in other contexts, courts of appeals have disagreed with treatises suggesting conflicts on "striking similarity" points, *see, e.g., Ty, Inc.*, 132 F.3d at 1170, and the court of appeals here perceived no conflict. Petitioners' reference to a "prior common source" (Pet. 14) likewise raises an evidentiary issue that can be addressed at trial.

courts of appeals. Pet. 17-18. However, the court recognized that access is "an essential element" of a plaintiff's case. Pet. App. 19a. Petitioners' claim of an intra-Circuit split, which would not be an adequate basis for review in any event, thus is erroneous.[6] Petitioners' claim of a conflict with decisions from the First, Fourth, and Ninth Circuits likewise is erroneous for the same reason. Those cases simply determined that, in the circumstances and on the evidence at issue there, an inference of access was not appropriate.[7] In this case, in marked contrast, even if petitioner Lloyd Webber and his wife's declarations are credited at face value, they merely show that petitioner Lloyd Webber does not consciously recall having been exposed to "Till You." *See* Pet. App. 50a-60a. However, that is not the point; unconscious copying is still impermissible copying. Pet. App. 16a.

The Fourth and Ninth Circuit decisions, moreover, are unpublished, and may not even be cited as precedent under Circuit rules (4th Cir. Local R. 36(c); 9th Cir. R. 36-3) — a factor that further undermines petitioners' claim for this Court's review.[8]

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[6] *See, e.g., Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988) ("Though striking similarity alone can raise an inference of copying, that inference must be reasonable in light of all the evidence"); *see also, e.g., Ty, Inc.* 132 F.3d at 1170 ("a similarity that is so close as to be highly unlikely to have been an accident of independent creation is evidence of access").

[7] The evidence in these cases negated any reasonable possibility of access. *See Grubb v. KMS Patriots, L.P.*, 88 F.3d 1, 5-6 (1st Cir. 1996) (relying, in part, on computer-generated timesheets, which "could not be backdated," to conclude that there was no genuine issue of material fact regarding prior creation); *Takeall v. Pepsico, Inc.*, 14 F.3d 596 (table), 1993 WL 509876, at **4-5 (4th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994); *Fodor v. Time Warner, Inc.*, 19 F.3d 27 (table), 1994 WL 65287, at **2 (9th Cir.), *cert. denied*, 513 U.S. 869 (1994). Notably, the Fourth Circuit's unpublished opinion explicitly agrees with Second Circuit precedent on striking similarity. *Takeall*, 1993 WL 509876, at **4-5 (citing *Gaste*, 863 F.2d at 1068).

[8] The court of appeals found that the evidence of striking similarity was an

Third, petitioners assert that "the court below has severely restricted the district court's discretion to grant summary judgment in copyright cases." Pet. 19. However, the court of appeals did not adopt some kind of per se rule that a district court may never consider the works at issue. The court merely held that, under settled summary judgment principles, "[i]t was not for the district court to make this factual finding where such strong competing evidence was before it." Pet. App. 19a. Once again, petitioners principally contend that the court of appeals' decision is inconsistent with the Second Circuit's own precedents. Once again, even if an intra-Circuit split presented a basis for this Court's review (which it does not), the suggestion of a conflict is erroneous. Like the panel decision here, the Second Circuit's precedents recognize that a comparison of works depends on an evaluation of the evidence in context.[9] The same is true of the two non-Second Circuit decisions and the copyright treatise cited by petitioners.[10] None of the cited decisions or authority remotely suggests that "strong competing evidence" (Pet. App. 19a) — which the court of

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adequate basis for reversal of the summary judgment. Notably, respondents also had argued — and continue to maintain — that other evidence also warranted proceeding to trial, including the wide dissemination of respondent Repp's song, the common genre of the songs, and petitioner Lloyd Webber's extensive prior copying. This evidence, which will be presented at trial, independently supports the judgment of the court of appeals reversing summary judgment, and further counsels against this Court's review of the court of appeals' interlocutory decision.

[9] *See Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140-41 (2d Cir. 1992); *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 765-66 (2d Cir. 1991); *see also* Pet. App. 15a & n.1 (citing and following *Laureyssens*).

[10] *See Baxter v. MCA, Inc.*, 812 F.2d 421, 423-25 (9th Cir.), *cert. denied sub nom. Williams v. Baxter*, 484 U.S. 954 (1987); *Wickham v. Knoxville Int'l Energy Exposition, Inc.*, 739 F.2d 1094, 1096-98 (6th Cir. 1984). *See also* 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 12.10[A], at 12-147 (1998) ("[T]he defendant should be denied summary judgment if on the issue of 'striking similarity' from which copying may be inferred without proof of access, there is a triable issue of fact.") (footnotes omitted).

appeals found in this case — should be rejected at the summary judgment stage.

Accordingly, petitioners present no issue warranting this Court's review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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June 22, 1998

APPENDIX – SCHEDULING ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

DATED APRIL 15, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

91 Civ. 906 (SWK)

RAY REPP and K & R MUSIC, INC.,

Plaintiffs,

- against -

ANDREW LLOYD WEBBER, THE REALLY USEFUL GROUP, PLC, THE REALLY USEFUL COMPANY, INC., MCA RECORDS, INC., HAL LEONARD PUBLISHING CORPORATION and POLYGRAM RECORDS, INC.,

Defendants.

SHIRLEY WOHL KRAM, U.S.D.J.

The Court having a scheduling conflict with certain criminal matters, it is hereby

ORDERED that the trial of this matter shall be adjourned to November 2, 1998 at 10:00 a.m.

SO ORDERED.

SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

DATED: New York, New York
April 15, 1998